Smith's Food & Drug Centers, Inc. ***and*** **International Union of Operating Engineers, Local 501, AFL–CIO** ***and*** **Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters, AFL–CIO, Petitioners.** Cases 21–RC–19312 and 21–RC–19315

February 13, 1996

DECISION ON REVIEW

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On March 30, 1994,[1] the Regional Director for Region 21 issued a Decision and Direction of Elections in which she found that the Employer's voluntary recognition of the Intervenor[2] on January 12 does not constitute a bar to the instant petitions because the Petitioners were engaged in active organizing at the time of recognition. The Intervenor filed a timely request for review, which a full Board majority granted by Order dated May 31.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The issue presented in this case is whether the Employer's voluntary recognition of the Intervenor will bar subsequent petitions that were not supported by a 30-percent showing of interest as of the time of recognition. In the circumstances of this case, we find a recognition bar. For the reasons explained below, we modify the Board's prior recognition-bar policy, as set out in *Rollins Transportation System*, 296 NLRB 793 (1989). This policy precluded the finding of a recognition bar in all cases where a petitioner had conducted an active organizing campaign simultaneously with that conducted by the recognized union. We hold that despite the existence of active and simultaneous organizing campaigns, an employer's voluntary recognition of a union bars the processing of a subsequent petition unless the petitioner demonstrates that it had a 30-percent showing of interest at the time of recognition. The Petitioners in this case have not demonstrated such a showing of interest. Therefore, we dismiss the petitions.

Facts

The Employer operates a milk production plant that began daily production on January 3, although some limited production occurred before that date and several employees worked at the plant during December 1993. On January 11, representatives of the Intervenor met with approximately 12 employees in the lunchroom of the plant, and solicited and obtained authorization cards from some of those present. After returning to the facility the following day and receiving additional authorization cards, Intervenor President Jim Byrd met with Glenn Brown, the plant manager, and they executed an agreement to conduct a cross-check of the authorization cards against the Employer's records to verify the Intervenor's card majority. When the cross-check was completed later that day, the Employer voluntarily recognized the Intervenor as the exclusive collective-bargaining representative of the employees at the milk production plant.

Prior to the recognition of the Intervenor, the Petitioners had also begun efforts to organize the employees at the new facility. On December 28, 1993, John Preciado, a business representative of Operating Engineers Local 501, contacted employee Norman Carter, discussed organizing activities with him, and scheduled a meeting for January 4. On January 3, Preciado called Teamsters Local 166 Business Agent Michael Carter and discussed with him a cooperative effort to organize the plant's employees, whereby Local 501 would organize the 4 operating and maintenance engineers and Local 166 would organize approximately 26 production employees. Preciado met with Norman Carter on January 4, explained the planned units to him, and gave him authorization cards, sample collective-bargaining agreements for dairies, and literature concerning union benefits, which Carter subsequently distributed to other employees. At this January 4 meeting, Norman Carter signed an authorization card for Local 501. The following day, Preciado went to the plant to examine the entrances in anticipation of future handbilling, but he did not enter the facility. He did not return to the facility until January 20, when he met with at least one employee in the breakroom and obtained at least one additional card. Local 501 filed its petition later that day.

Teamsters Local 166 also began organizing activities in December 1993, after a prospective plant employee came to the Union's office to inquire whether Local 166 would be representing the production employees at the new facility. On December 29, 1993, Local 166 Representative Michael Carter visited the plant wearing a Teamsters jacket. Plant Manager Brown gave him permission to enter and speak with employees as long as production was not interrupted. Michael Carter met with one employee that day and provided him with cards to distribute. An employee had come to Michael Carter's office in late December and had submitted a signed card, which was misplaced.

On January 5, Michael Carter had accompanied Preciado on his visit to the facility. Like Preciado, Carter familiarized himself with the entrances. After that visit, several employees came to the union office and received cards and literature, but Local 166 ob-

[1] All dates are 1994 unless otherwise indicated.

[2] United Food and Commercial Workers Union, Local 439, United Food and Commercial Workers International Union, AFL–CIO.

tained no additional signed cards prior to the Employer's recognition of the Intervenor, United Food and Commercial Workers Union, Local 439, on January 12. During a visit to the plant on January 21, Michael Carter secured sufficient cards to support Local 166's petition, which was filed the same day.

Neither Local 501 nor Local 166 possessed a 30-percent showing of interest on January 12, the date of the Employer's recognition of the Intervenor.

Discussion

Applying Board precedent under *Rollins*, supra, the Regional Director found that the Employer's voluntary recognition of the Intervenor did not constitute a bar to the instant petitions. The Regional Director found that the Petitioners were actively engaged in organizing prior to the January 12 recognition of the Intervenor. He rejected the Employer's and the Intervenor's argument that the prerecognition efforts of the Petitioners were merely preparatory to active campaigns. The Regional Director also rejected the Employer's and the Intervenor's contention that, in order for a petitioner's prerecognition organizing activities to raise a question concerning representation requiring a Board election, the petitioner must have obtained, prior to the recognition, a sufficient number of cards to support a petition. Contrary to the Regional Director, we find merit in this contention.

In *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), an unfair labor practice case, the Board held that the lawful voluntary recognition of a union based on a demonstration of majority support entitles the union to a reasonable period of time for bargaining without a challenge being raised concerning the union's continued majority status. Subsequently, in *Sound Contractors*, 162 NLRB 364 (1966), the Board determined that the same principle should apply in representation cases. Thus, the Board held that no question concerning representation may be raised, and thus petitions are barred, during a reasonable period of time following an employer's lawful recognition of a union.

In both *Keller* and *Sound Contractors*, the recognition occurred in circumstances where only the recognized union was engaged in organizing at the time of recognition. In *Rollins*, the Board reached a contrary result (i.e., no recognition bar) where two unions (the recognized union and another one) were organizing at the time of recognition. In these circumstances, the Board held that it would process a petition if it was filed within a reasonable period after lawful recognition.

The specific facts in *Rollins* provided strong support for the result reached by the Board. Both unions had conducted organizing campaigns over a period of 2 months. Both assertedly had secured authorization cards from a majority of the employer's employees. Although the union ultimately recognized by the employer had contacted the employer a week earlier to state its claim of majority status, the actual recognition occurred on the same day, and almost at the same moment, as the filing of the petition by the other union. See also *Superior Furniture Mfg. Co.*, 167 NLRB 309 (1967). Under these circumstances, the Board reasonably determined that a question concerning representation was raised by the petition and that an election shall be conducted.

The holding in *Rollins*, however, was not limited to cases presenting such close timing or such strong showings of support by the petitioner. In *King Manor Care Center*, 303 NLRB 19 (1991), for example, the joint employers recognized a union as the representative of two units. Eighteen days after recognition of the representative in one unit and 2 days after recognition in the other unit, a petition was filed by another union to represent the same employees in a single unit. The Board found no recognition bar. It did so without determining whether the showing of interest in support of the petition was obtained prior to the date of recognition. In *Bus Systems*, 297 NLRB 169 (1989), two unions competed in simultaneous campaigns to represent the employees of a joint employer. The employer extended recognition to one union, in separate units, on November 14, 1988, and November 22, 1988, based on demonstrated card majorities. The petitioner secured its first authorization cards on November 17, 1988, requested recognition on November 25, 1988, and filed a petition for a combined unit on December 21, 1988, over a month after the rival union had been recognized. Relying on *Rollins*, the Board found that the concurrent campaigns precluded the existence of a recognition bar. The Board also specifically found that the petitioner's sustained distribution of authorization cards was sufficient to constitute active organizing under *Sound Contractors*.

The present policy under *Rollins*, requiring an election whenever the recognized and the petitioning unions engaged in overlapping campaigns, is intended to protect the right of employees to select their own collective-bargaining representative and to minimize the role of the employer or pure chance in the selection process. On the other hand, applying the *Rollins* holding to deny bar quality to an employer's voluntary recognition in all cases involving simultaneous campaigns would undermine other fundamental objectives. Such an approach unnecessarily discourages employers from voluntarily recognizing labor organizations. It does so because it leaves the status of the recognition in doubt based on the possible filing of a petition by another union, even if the employer is unaware that the other union was attempting to organize its employees. Moreover, where a petition is later filed by a competing union, the current *Rollins* policy disrupts the nas-

cent relationship between the employer and the lawfully recognized union pending the outcome of an election and any subsequent representation proceedings. This may entail a significant delay. In this way, the *Rollins* approach permits and may even encourage unions with little or no employee support, as of the time of recognition, to frustrate the establishment of new collective-bargaining relationships by their rivals. By attempting to eliminate all ambiguity regarding employee desires as well as any possibility of collusive, ''sweetheart'' deals between employers and unions, the *Rollins* policy may defeat the very objective that it seeks to achieve—giving effect to the employees' freely expressed designation of a union as their representative.

We find, on the other hand, that requiring a petitioner to demonstrate a 30-percent showing of interest that predates the employer's voluntary recognition of a rival union appropriately balances competing interests by effectuating employee free choice, while at the same time promoting voluntary recognition and reasonably protecting the stability of collective-bargaining relationships. The requisite showing of employee support is that required for the filing of a petition. Thus, we ensure that a union capable of filing a petition at the time of recognition is not denied the opportunity for an election because it underestimated a competing union's support, or it simply arrived at the Board's office a little too late. More importantly, our rule does not rigidly impose on employees the fortuitous consequences of the union's filing, a matter over which they have no control.

Considering all the above policy concerns, we hold that, in rival union initial organizing situations, a voluntary and good-faith recognition of a union by the employer based on an unassisted and uncoerced showing of interest from a majority of unit employees will bar a petition by a competing union, unless the petitioner demonstrates a 30-percent showing of interest that predates the recognition. Where such interest is shown, an election is warranted in order to guarantee employees an opportunity to express their desires in a definitive manner.[3]

This modification of the *Rollins* rule is consistent in principle with the approach adopted by the Board in unfair labor practice cases involving the lawfulness under Section 8(a)(2) of an employer's recognition of one of two or more campaigning labor organizations. In *Bruckner Nursing Home*, 262 NLRB 955 (1982), the Board announced that, henceforth, an employer's recognition of a majority union would be unlawful if, at the time, another union had filed a petition with a 30-percent showing of support. The mere fact that another union was organizing was not sufficient, by itself, to render unlawful the extension of recognition to the majority union.

We view *Bruckner* as consistent with the approach we now adopt in representation cases, even though we do not go so far as to make the filing of a petition the determinative event for recognition-bar purposes. In an unfair labor practice case, the designation of the filing of a petition as the pivotal event obviates the need for guesswork by employers about statutory liability and enhances consistent adjudication by the Board. The Board has an obligation to provide clear guidance wherever possible so that parties can understand the legal requirements imposed on them and reasonably predict the consequences of their actions. The Board would not further the policies of the Act by leaving well-intentioned employers to guess whether they may lawfully recognize a union supported by a majority of their employees, or whether they risk committing an unfair labor practice by doing so.

In representation cases, however, the issue presented is not whether the employer acted lawfully in recognizing a union, but whether the circumstances of a lawful recognition are sufficient to warrant the dismissal of a petition by a competing union. In such situations, the Board determines whether a question concerning representation exists and, if so, directs an election to guarantee employee free choice. Although the processing of a petition that satisfies our 30-percent rule may delay the progress of a fresh collective-bargaining relationship between the employer and the recognized union, it carries no implications of legal liability on the part of the employer. Under these circumstances, and having balanced the competing interests involved, we find it appropriate to establish a policy that tolerates a very limited degree of uncertainty regarding the status of a recently granted recognition in order to give effect to employee desires and guarantee them free choice in their selection of a bargaining representative.

The positions of the *Rollins* majority and our concurring colleague err at two extremes. Under the view of our concurring colleague, an employer's recognition of union A would be a bar to a petition by union B, even if union B had substantial support at the time of recognition and even if that support was growing. By contrast, we would permit unions A and B to vie in an election, rather than freeze out union B for the duration of the recognition-bar period and for the period of any 3-year contract that might be signed. In addition, the view of our concurring colleague gives an unwarranted degree of control to the employer, at the expense of Section 7 rights. For example, where a strong union is competing against a less effective one, the

[3] This decision modifies only that aspect of recognition bar going to simultaneous organizational campaigns by two or more labor organizations. The other, general requirements of *Sound Contractors Assn.*, 162 NLRB 364 (1967), for establishing a recognition bar remain in effect, including the requirements that recognition must be in good faith and on the basis of a previously demonstrated majority status.

employer would be more likely to voluntarily recognize the less effective one if it obtains card majority status, and would be less likely to voluntarily recognize the strong union if it achieves card-majority status. The recognition-bar rule that we prescribe today in ''two-union'' situations will prevent the employer from co-opting employee free choice by extending recognition to a less effective union in an effort to freeze out, via recognition and contract bar, a stronger union with whom it may not want to deal even though this union has a 30-percent showing of interest sufficient to raise a question concerning representation. In this way, our rule reduces the potential for undue influence by employers and ensures that the genuine desires of the employees in selecting their collective-bargaining representative are carried out.

We also disagree with our concurring colleague that our 30-percent position creates uncertainty as to the stability of voluntary recognition. All that our test requires is that the rival union have a 30-percent showing of interest at the time of recognition. Determining whether a rival union has a 30-percent showing of interest is an administrative matter not subject to litigation,[4] is one familiar to the Board's Regional Offices, and is in most cases routine. At worst, an employer and the recognized union would be delayed from bargaining only for the short period after the rival union has filed a petition and before the Region has made the administrative determination of the rival union's showing of interest. We believe that any minor uncertainty created by this slight interruption is reasonable and necessary to ensure that employees' representation desires are carried out.

The *Rollins* majority errs at the other extreme. In its view, an employer's recognition of union A would not be a bar to a petition by union B, even if union B had no support among employees at the time of recognition. In our view, the values of voluntary recognition are sufficiently important to accord bar quality to the recognition extended in these circumstances.

Avoiding the two extremes, we would accord bar quality to the recognition of union A if union B has less than 30-percent support at the time of recognition, and we would not accord bar quality if union B's support was 30 percent or higher. The 30-percent figure is not chosen at random. It is the traditional figure for a showing of interest that is sufficient to raise a question concerning representation. Similarly, as noted above, the 30-percent figure seeks to harmonize ''C case'' law and ''R case'' law. Under the former, if union B has 30-percent support and files a petition, the employer cannot lawfully recognize union A. Any such recognition would be unlawful and would not be a bar. Similarly, under the ''R case'' law that we apply today, if union B has 30-percent support, the employer's recognition of union A would not be a bar. The only difference is that, in the second situation, there is no petition filed by union B at the time of recognition. But unions can have myriad reasons, tactical or strategic, for not filing a petition when their support is only at the 30-percent threshold. The choice of union B to refrain from filing a petition when it has 30-percent support should not permit the employer to recognize union A and thereby preclude union B from filing a subsequent petition when it has more support.

Applying the new rule to the present case, we find that neither Petitioner had secured the requisite 30-percent showing of interest prior to the Employer's voluntary recognition of the Intervenor on January 12.[5] Preciado obtained one signed authorization card on behalf of Operating Engineers Local 501 on January 4. He did not receive another card until January 20, 8 days after the recognition. Thus, at the time of recognition, Local 501 possessed only a 25-percent showing of interest in the petitioned-for unit of four employees. At the time of recognition, Teamsters Local 166 had received 1 card in the petitioned-for unit of approximately 26 employees. That card was misplaced. Both of the instant petitions are therefore barred under the 30-percent rule by the Employer's recognition of the Intervenor. Accordingly, the petitions are dismissed.

ORDER

The Regional Director's decision is reversed, the direction of election is vacated, and the petitions are dismissed.

CHAIRMAN GOULD, concurring.

I agree with my colleagues that the Employer's recognition of the Intervenor in this case bars the processing of the petitions. Rather than modify the Board's current policy under *Rollins*,[1] however, I would overrule *Rollins* entirely in favor of a policy barring any petition filed after the voluntary recognition of a union by an employer, as long as the recognition is based on a verified showing of majority support and in the absence of employer coercion or assistance.[2]

The establishment of a successful collective-bargaining relationship is best accomplished by the parties themselves—the employer, the union, and the unit employees. The Board should refrain from involving itself in this process unless such involvement is clearly war-

[4] *O. J. Jennings & Co.*, 60 NLRB 516 (1946).

[5] As we have stated above, determining whether a rival union has the required 30-percent showing of interest at the time of recognition is an administrative matter not subject to litigation. Because we have sufficient facts in the record to determine that the Petitioners did not have the required 30 percent at the applicable time, however, it is unnecessary for us to remand this case for an administrative investigation of the showing of interest.

[1] *Rollins Transportation System*, 296 NLRB 793 (1989).

[2] Consistent with this view, I agree with my colleagues in overruling *Bus Systems*, 297 NLRB 169 (1989).

ranted for the protection of statutory rights. In initial organizing situations, most employees who do not already understand their rights and the workings of the organizational process will take the steps necessary to educate themselves concerning these matters. Unions and employers, therefore, should be entitled to accord full weight to employees' expressions of their desires through signed authorization cards and should be encouraged to enter into recognition agreements in reliance on them.

A rule which allows an employer's recognition of a union based on a majority showing of interest to preclude the existence of a question concerning representation for a reasonable period of time strongly promotes voluntary recognition by permitting the parties to undertake bargaining without fear of a later challenge by another union. Furthermore, this policy effectuates rather than impedes employee free choice. When employees execute authorization cards during a union organizational drive, their hope is to obtain union representation as soon as possible. The Board provides no benefit to these employees by delaying the implementation of their designation in order to reconfirm through an election the desires they have already expressed. The primary concern in these situations is whether the employees are satisfied with their choice, not whether the Board has any suspicions concerning the process or outcome of that choice. If an employee or a competing union believes that the employer provided unlawful assistance to the recognized union, they may avail themselves of the Board's unfair labor practice proceedings under Section 8(a)(2). If employees later decide that their designated representative does not meet their expectations, they may take steps to decertify the union after a reasonable time for bargaining[3] or at the earliest opportunity. In any event, the Board must proceed on the assumption that employees are competent to function in the environment of union organizing campaigns and must resist the temptation to second guess the choices made by the parties.

Moreover, I believe, as stated by former Member Cracraft in her dissent in *Rollins*, that the Board's policy on recognition bar should be as consistent as possible with its treatment of recognition by employers in unfair labor practice cases arising under Section 8(a)(2). In accordance with *Bruckner Nursing Home*, 262 NLRB 955 (1982), an employer may lawfully recognize a union demonstrating majority support at any time until the filing of a petition by another union. By establishing another standard for purposes of recognition bar, whether it be the new rule endorsed by the majority or the current rule under *Rollins*, we create uncertainty as to the stability of voluntary recognitions and generate reluctance by employers to enter into them. I believe that the Board should afford employers and unions the same degree of certainty in representation cases as it does in unfair labor practice cases involving essentially the same question. Therefore, I would find that voluntary recognition lawfully granted resolves any question concerning representation and bars subsequent petitions for a reasonable time in order to allow the employer and the recognized union to engage in collective bargaining.

[3] *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966).